OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 87-2 26 March 1987

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Guideline Memorandum Concerning John Deklewa & Sons, 282 NLRB No. 184

In its recent decision in Deklewa, the Board held that:

1. A collective bargaining agreement permitted by Section 8(f) shall be enforceable through Sections 8(a)(5) and 8(b)(3).

2. Such agreement will not act as a contract bar to a representation petition.

3. In processing such representation petitions the unit normally will be the single employer's employees covered by the contract, rather than any multi-employer unit.

4. Upon the expiration of that Section 8(f) agreement, the signatory union will enjoy no presumption of majority status, and either party may repudiate the Section 8(f) bargaining relationship. 1/

With respect to the first point, the Board has dispensed with any requirement that the General Counsel show, in a contract repudiation case, that the Section 8(f) agreement was converted into a Section 9 agreement by the union's acquisition of majority status. In essence, a repudiation of the contract will constitute a violation of Section 8(a)(5) or 8(b)(3) without regard to whether the union is the majority representative. 2/ Although the majority status of the union can be tested in a

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1/ This memorandum does not attempt to set forth the full rationale for these conclusions. In this regard, the decision speaks for itself.

2/ The issue of whether there are other Section 8(a)(5)-8(b)(3) obligations during the term of the 8(f) contract (e.g. duty to supply information, duty to bargain about subjects not covered by contract) should be submitted to Advice.

representation proceeding (see infra), it cannot be unilaterally resolved by the employer's repudiation of the contract. 3/

With respect to the second point, the Board has made it clear that the Section 8(f) contract is not a contract bar. Thus, for example, RC, RD, and RM 4/ petitions can be filed and processed. However, unless and until the union loses an election, the employer must continue to honor the contract. 5/ If the union loses the election, the employer and union would be prohibited, under Sections 8(a)(2) and 8(b)(1)(A), from entering into a collective bargaining relationship for one year. If the union wins the election, the employer must deal with the union as the Section 9 representative.

As to the third point, the unit in which the Board would conduct an election would normally be the single employer unit. This would be true even if the employer has agreed, in the contract or otherwise, to be part of a multi-employer unit. 6/

As to the fourth point, there is no presumption of majority status after the expiration of a Section 8(f) contract. Thus, absent proof of majority status, either party can repudiate

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3/ Although the union can thus vindicate its position through a Section 8(a)(5) proceeding, the Board left open the issue of whether the union can protest the repudiation through picketing. See n. 56 of Board's Opinion. Cases presenting this issue should be submitted to Advice.

4/ Unlike a normal RM petition, the employer need not demonstrate objective considerations supporting a good faith doubt of majority status. See n. 42 of Board's opinion. This principle follows from the fact that a Section 8(f) contract does not depend upon majority status.

5/ It would appear that the employer acts at its peril if it repudiates the agreement based solely on the election results, rather than waiting for the resolution of any challenges or objections. Thus, if the union's election loss is ultimately upheld, the repudiation would be lawful. But if it is not upheld, the repudiation would arguably be unlawful.

6/ As with any representation case, issues of unit and eligibility will be decided on the facts of each case in the representation proceeding.

the relationship at that time. Further, the Board held (slip op. pp. 28-29) that the union cannot picket or strike to reestablish the relationship. 7/

Even if the union has majority status at the time that it seeks a second contract, it is clear that the employer can nonetheless decline recognition and insist upon a Board-conducted election. 8/ Further, as noted supra, the Board has said that the union cannot picket or strike to regain such recognition.

Of course, the employer can voluntarily elect to renew the relationship after the expiration of the Section 8(f) contract. However, absent further evidence, it would appear that the renewed relationship remains a Section 8(f) relationship. The question of whether the ensuing negotiations for a new contract are subject to the duty to bargain in good faith in this context should be submitted to Advice. In addition, the issue of whether Section 8(d) notices must be sent, and the waiting periods observed, in this context should be submitted to Advice.

Similarly, the Section 8(f) contract may renew itself because no party gave a required notice to terminate it. In such circumstances, it would appear that the renewed contract is another Section 8(f) contract.

Finally, after the expiration of a Section 8(f) contract, the employer may voluntarily elect to recognize the union as the Section 9 representative, based upon a valid claim of majority status. In such circumstances, there may be a reasonable argument that the relationship has become a Section 9 relationship. That is, an employer that voluntarily recognizes or contracts with a majority union is ordinarily considered to have entered into a full Section 9 relationship. And, the Board has indicated that it does not intend to treat unions in the construction industry less favorably than unions in other industries. 9/ The Region should submit to Advice any cases raising the issue of whether an employer's voluntary recognition

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7/ The Board's proscription on picketing presumably refers to Section 8(b)(7). Thus, the Board has implicitly rejected the possible argument that the picketing is lawful because it is not for initial recognition. Whitaker Paper Co., 149 NLRB 731; Frank Wheatley Pump, 150 NLRB 565. Section 8(b)(7) does not however forbid strikes, and, in Curtis Bros., 362 U.S. 274 the Supreme Court held that pressure to secure minority recognition is not unlawful under Section 8(b)(1)(A). Cases presenting strike issues should be submitted to Advice.

8/ Linden Lumber, 419 U.S. 301.

9/ See n. 53 of Board's Opinion.

or voluntary entry into a second contract, based upon the union's valid claim of majority status, establishes a Section 9 relationship.

To sum up, the Board regards the Section 8(f) contract as establishing a "limited" Section 9 relationship. 10/ It is a Section 9 relationship in the sense that a repudiation of the contract will constitute a Section 8(a)(5) or 8(b)(3) violation. However, unlike a normal Section 9 relationship, a representation petition can be processed during the term of the contract. And, unlike a normal Section 9 relationship, the employer's consent to become part of a multi-employer unit will nonetheless leave the unit a single-employer unit for representation-case purposes. Finally, unlike a normal Section 9 relationship, the union is not entitled to an irrebuttable presumption of majority status during the contract term or to a rebuttable presumption of majority status thereafter.

The Board also made it clear that the principles set forth in Deklewa apply to all pending cases in whatever stage. Finally, the Board made it clear that the Deklewa principles apply only to Section 8(f) contracts. If the employer recognized a union that had majority status among a "stable work force", the relationship would be a full Section 9 relationship and the Deklewa principles would not apply. 11/

Submissions to Advice

If the Region has a case that is clearly controlled by Deklewa, it may dispose of the case on its own. All other cases, including particularly those cases that present issues specifically raised herein, should be submitted to Advice.

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10/ See pp. 34-37 of Board's Opinion.

11/ Ibid.